

Providing a reference

This newsletter sets out the key issues a business should consider before providing a reference for an employee or former employee.

Types of reference

A business is most likely to be asked to provide a reference for a prospective employer, although it could be asked to give one in other circumstances (for example, a financial reference for a mortgage application). References can be given on behalf of the business as a corporate reference or in a personal capacity.

Corporate references

The business will be legally responsible for the contents of a corporate reference because it is provided on its behalf. A business should implement a policy stating:

- Which employees or level of management can give a corporate reference.
- What format the reference should be in (verbal or written).
- What information the reference can include.

Personal references

A personal reference can refer to work undertaken for the business but it must not be given on behalf of the business. There is always a danger that a personal reference is taken to be a corporate reference, so ensure it is not provided on headed notepaper and does not include the referee's job title.

Providing a reference

Generally, there is no legal obligation on a business to provide a reference for an employee or former employee and therefore the business is entitled to refuse to provide one. However, the business's policy on references must be consistent or it could lead to allegations of discrimination. There are some limited exceptions to this rule as set out below.

Discrimination

The business must ensure that a refusal to provide a reference is not discriminatory. A business is not allowed to discriminate on the basis of any

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The information in this newsletter is not meant as a substitute for advice on particular issues and is written in general terms. You should seek specific advice before taking any action based on the information in this newsletter.

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This newsletter outlines the law as it stands at the date of writing in February 2016.

of the nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Having a clear policy in place about the circumstances in which references will be given will help in defending any allegations of discriminatory treatment.

Victimisation

A refusal to provide a reference may lead to a claim of victimisation if an employee or former employee has:

- Previously brought discrimination proceedings against the business.
- Given evidence or information in discrimination proceedings against the business.
- Made an allegation of discrimination against the business (for example, under the business's grievance procedure).

Settlement agreements

Settlement agreements often include a term stating that, if requested, a reference will be provided in an agreed form, usually annexed to the agreement. Make sure the business adheres to the agreed wording in these situations and that any oral reference provided does not go further than or deviate from the agreed wording. To avoid problems, ensure the standard wording in settlement agreements includes the phrase:

“subject to any further information coming to our attention which we consider should be included in the reference, we agree to provide a reference in the following terms”.

What information should be included in a reference?

The business owes a duty of care to both the subject and the recipient of any reference it provides. The business must, therefore, take care to ensure the information it contains is true, accurate and fair. A business is not obliged to provide any detail in the reference or for it to be comprehensive.

A reference could simply provide brief factual details of the start and finish dates of employment and the roles performed and no more. However, the business should include a statement in this type of reference that it is company policy to provide only factual details, so it does not reflect badly on the employee in question.

If the business decides to provide a more comprehensive reference, a disclaimer should be included. Any disclaimer the business includes must be reasonable. A more detailed reference may include information on:

- Performance in the job.

- Disciplinary record.
- Honesty.
- Time-keeping.
- Absence record.
- Reason for leaving.

Duty owed to the subject of the reference

Discrimination

The business must not provide a discriminatory reference. A business should take particular care when making comments about performance, attendance or sickness absence where there is a risk that these comments may be discriminatory on the grounds of disability. A reference must also avoid victimising the subject (for example, if they have previously complained of discrimination).

Defamation

The business must be able to justify and support any comments made in a reference and show that it honestly holds the views made in the reference to be true.

A business cannot be successfully sued for defamation for the contents of a reference (even if its contents are untrue), providing the business believed the information in the reference was correct at the time it was provided and the contents were provided without malice.

Malicious falsehood

A business could be sued for malicious falsehood if an individual can show that a reference the business gave contained untrue words that were published maliciously (that is, the person who wrote the reference knew the words were untrue or did not care whether they were true or not).

Negligent misstatement

The business could be sued for negligence if it provides an inaccurate reference.

Breach of contract

A business could be sued for breach of contract if it does not give a reference when the business has previously agreed to provide one (for example, in a contract of employment).

Duty owed to the recipient of the reference

Negligent misstatement

A business will usually be asked by a prospective employer for information about an ex-employee because it has specialist knowledge of that employee. If the business provides an inaccurate reference that the prospective employer relies on, it could be sued for negligence.

Deceit

If a business knowingly includes false information with the intention that the recipient will rely on it, the business could be sued by the recipient for deceit.

Data protection

A business must be careful when providing information in a reference about an employee's sick record or reasons for periods of absence, because information about health is regarded as sensitive personal data.

It should be possible to provide information about how many days absence from work an employee has had during the last year without revealing any sensitive personal data.

If a business is asked to provide information on the reasons for an employee's absence, it should exercise caution and seek consent from the employee. The business should show the employee a draft response and seek their approval before disclosing it.